



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

NOV 8 2011

REPLY TO THE ATTENTION OF

R-19J

George W. Pendygraft, P.C.
1000 Waterway Boulevard
Indianapolis, Indiana 46202

Re: Indiana Department of Environmental Management
Federally Approved NPDES Program

Dear Mr. Pendygraft:

In a letter dated September 9, 2002 (hereinafter, "the petition"), you requested that the U.S. Environmental Protection Agency withdraw its approval of the State of Indiana's National Pollutant Discharge Elimination System ("NPDES") permit program. In your petition, you assert that approval of the State's program should be withdrawn because the Indiana State law requirements for judicial review of NPDES permits in Indiana are not consistent with 40 CFR § 123.30. You also assert that approval should be withdrawn because the Indiana Department of Environmental Management ("IDEM") has not adopted regulations comparable to EPA's Combined Sewer Overflow ("CSO") Policy. Finally, you suggest that IDEM's alleged failure to complete a triennial review of its water quality standards "triggers" review of whether IDEM has developed an adequate regulatory program for developing water quality based effluent limitations in NPDES permits.

For the reasons described below, EPA sees no reason to exercise its discretion to commence withdrawal proceedings.

Opportunity for Judicial Review

The Federal rules governing State NPDES programs at 40 CFR § 123.30 provide that such programs "shall provide an opportunity for *judicial review in State Court* of the final approval or denial of permits by the State that is sufficient to provide for, encourage, and assist public participation in the permitting process" (*emphasis added*). The petition and attached exhibits provide no basis for EPA to evaluate your contention that Indiana law fails to provide an opportunity for judicial review of State-issued NPDES permits in accordance with this regulation. The petition cites to positions taken by IDEM in briefs in an *administrative* NPDES permit appeal brought by a number of parties including your client, former Indianapolis City Councilor Beulah Coughenour, before a State administrative law judge regarding two NPDES permits issued to the City of Indianapolis. In that proceeding, IDEM argued that Councilor Coughenour and others had failed to establish the requisite standing to pursue an administrative appeal of the permits in question.¹ However, nothing in the petition addresses the issue of

¹ We are aware that the Indiana Office of Administrative Appeals subsequently dismissed your client's administrative appeal on standing grounds and that your client declined to seek judicial review of that decision.

judicial appeals of NPDES permits; nor does the petition cite to any judicial decisions or other authority suggesting that the opportunity for *judicial review* under Indiana law fails to satisfy federal requirements. Hence, your petition provides no support for your allegations regarding an alleged inconsistency with 40 CFR § 123.30. Indiana's provisions for judicial review of state agency actions include IC 4-21.5-5. Your petition did not identify or suggest any shortcomings in the opportunity for judicial review provided by the State. Consequently, your petition does not convince EPA to exercise its discretion to commence withdrawal proceedings on these grounds.

Failure to Adopt Regulations Comparable to EPA's CSO Policy

The petition also states that approval of the State's NPDES program should be withdrawn because IDEM has not adopted regulations to incorporate EPA's CSO Policy into law. You support your claim by referring to Section 402(q) of the Clean Water Act to require that NPDES permits for CSO discharges "shall conform to" EPA's CSO Policy.

EPA regulations require that State NPDES permit programs must "have legal authority to implement [EPA's NPDES permitting requirements] and must be administered in conformance with [those requirements]." 40 CFR § 123.25(a). Thus, the State of Indiana's obligations with respect to Section 402(q) is to ensure that IDEM has adequate legal authority to issue permits that "conform to" EPA's CSO Policy, and to in fact issue permits that "conform to" EPA's CSO Policy. Nothing in Section 402(q) or EPA regulations requires that states adopt regulations that mimic EPA's 1994 CSO Control Policy. Rather, state permits must contain the technology-based and water quality-based effluent limitations required by the CWA in a manner that "conforms to" the 1994 CSO Policy.

As noted on page 2 of the petition, IDEM believes that it has authority under State law to issue such permits, and the petition fails to cite to anything which suggests otherwise. Moreover, the petition does not cite to any NPDES permit issued by IDEM that does not "conform to" EPA's CSO Policy. Consequently, I conclude that the petition fails to provide information to substantiate the assertions regarding IDEM's alleged inability or failure to implement EPA's CSO Policy in accordance with Section 402(q). In these circumstances, I conclude that, with respect to the assertions regarding IDEM implementation of the CSO Policy, the petition similarly does not establish cause for EPA to commence withdrawal proceedings.

Failure to Develop Water Quality Based Effluent Limitations in NPDES Permits

In a one-sentence footnote, you suggest that IDEM failed to complete a triennial review of its water quality standards for more than nine years, and that this "triggers" review of whether IDEM has developed an adequate regulatory program for developing water quality based effluent limitations in NPDES permits. See 40 CFR §123.63(a)(5). You do not explain why this alleged failure triggers such a review. Moreover, you do not allege that there are any specific inadequacies in Indiana's water quality standards that you believe need to be remedied as part of a triennial review, or that IDEM has issued any specific permits that did not contain appropriate

water quality based effluent limitations. In short, you provide no support for your assertion. Therefore, I conclude that your footnote does not establish cause for EPA to exercise its discretion to commence withdrawal proceedings

To the extent your petition expressed concern that the water quality standards applicable to CSO cases in Indiana should be reviewed, Indiana has recently conducted such a review. At issue in controlling CSO discharges is meeting Indiana's designated use for streams so they can support public recreation, such as swimming and boating. EPA notes that the State of Indiana substantially revised portions of its water quality standards in 2007 pertaining to CSOs to, among other things, create a special, wet-weather limited recreational designated use subcategory for CSO communities that have implemented approved CSO long term control plans. See 327 IAC 2-1-3.1; 327 IAC 2-1.5-5; and 327 IAC 5-2-10(c). EPA approved those revised water quality standards in accordance with Section 303(c) of the Clean Water Act on June 9, 2008.

Conclusion

EPA denies your request to exercise its discretion to initiate proceedings to withdraw Indiana's NPDES program because you have failed to establish cause that the judicial review requirements in Indiana are inadequate, or that IDEM is not adequately implementing EPA's CSO Policy or developing water quality based effluent limitations in NPDES permits. If you believe that there is evidence that the requirements for judicial review are inadequate, or that IDEM is not adequately implementing EPA's CSO Policy or developing water quality based effluent limitations in NPDES permits such that there is cause to commence withdrawal proceedings, you may file a second petition addressing those issues and we will certainly evaluate that second petition based upon the evidence attached or cited to in the petition. However, because no such evidence was attached or cited to in the instant petition, you have failed to establish cause for EPA to exercise its discretion to commence withdrawal proceedings against IDEM.

Thank you for your interest in this matter. Please contact Nicole Cantello in the Office of Regional Counsel at (312) 886-2870 if you have any questions.

Sincerely,



Susan Hedman
Regional Administrator

Enclosure

cc: Mr. Thomas W. Easterly
IDEM

THE UNIVERSITY OF CHICAGO
DIVISION OF THE PHYSICAL SCIENCES
DEPARTMENT OF CHEMISTRY

REPORT OF THE
COMMISSIONER OF THE
BUREAU OF CHEMISTRY
FOR THE YEAR 1900
BY
J. H. MANNING
CHIEF OF BUREAU

CHICAGO
PUBLISHED BY THE
UNIVERSITY OF CHICAGO PRESS
1901

THE UNIVERSITY OF CHICAGO
DIVISION OF THE PHYSICAL SCIENCES
DEPARTMENT OF CHEMISTRY

REPORT OF THE
COMMISSIONER OF THE
BUREAU OF CHEMISTRY
FOR THE YEAR 1900
BY
J. H. MANNING
CHIEF OF BUREAU

CHICAGO
PUBLISHED BY THE
UNIVERSITY OF CHICAGO PRESS
1901